

REMARKS

Applicants thank the Examiner for the consideration given the present application. Upon entry of the amendments herein, Claims 1, 4-13, 16, 27-29 and 43-49 will be pending. The Specification at page 21, and Claims 1, 4, 16 and 27 have been amended and Claims 2-3, 14-15, 17-26 and 30-42 have been canceled. Additionally, Claims 43-49 have been added. Applicants respectfully assert that no new matter has been added.

In particular, the Specification has been amended on page 21 to add a supporting paragraph discussing the optional inclusion of oil in the present compositions. Support for this amendment can be found in Claims 19 and 20 as originally filed.

Moreover, Claim 1 has been amended to add the words "c) a pH of from about 2 to about 5." Support for this amendment is found in Claim 3 as originally filed.

Claim 4 has been amended to modify its dependency.

Claim 16 has been amended to remove the terms "an oil," and to add the terms "a fatty acid selected from the group consisting of omega-3-fatty acids, esters thereof, and mixtures thereof." Support for this amendment is found in Claim 20 as originally filed. Additionally, Claim 16 has been amended to modify its dependency.

Claim 27 has been amended to incorporate Claims 1 and 21 as originally filed. Specifically, Claim 27 has been amended to remove the words "according to Claim 2 having," and to add the language "comprising: a) a first component which is arabinogalactan; b) a second component which is soy protein; and c)." Support for this amendment is found in Claims 1 and 21 as originally filed.

The Rejection under 35 U.S.C. § 112, second paragraph

The Examiner has rejected Claim 27 under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention. Specifically, the Examiner states that "Claim 27 is confusing in that it depends on Claim 2, and an art rejection is required, but if the dependency of Claim 27 is a mistake and the Claim should have been depending on Claim 26, then the Claim is allowable."

In response to the foregoing, Applicants have herein amended Claim 27 to incorporate the terms of both Claim 1 and claim 21, such that Claim 27 now requires a first component which is arabinogalactan, and a second component which is soy protein, in addition to the pH limitation of from about 5 to about 8, which was present in Claim 27 as originally filed. As the Applicants have amended Claim 27 to include these further requirements, it is respectfully asserted that Claim 27 is no longer confusing, nor does it require an art rejection. Thus, Applicants respectfully request withdrawal of the rejection under 35 U.S.C. § 112, second paragraph.

The Rejection under 35 U.S.C. § 102(b)

The Examiner has rejected Claims 1, 2, and 27 under 35 U.S.C. § 102 (b) as being anticipated by either Zhuravskaya *et al.*, XP-002194869 (herein "XP"), Stanko, US Patent No. 3,294,544 (herein "Stanko"), or Kogyo, JP 2-154,673 (herein "Kogyo"). For the following reasons, Applicants respectfully traverse these rejections.

Synopsis of the Invention

The addition of fiber to various food, beverage, and other ingestible products is known to be highly advantageous for various health benefits, particularly those benefits associated with enhanced gastrointestinal health, lowered cholesterol, and even prevention of cancer or other diseases. However, the addition of fiber to certain ingestible forms can be problematic. This may be a particular issue where it is desired that protein components are also delivered, as such protein components will typically cause gelling or complexing of the fiber.

Additionally, wherein the protein component (*e.g.*, a dairy protein) also delivers various minerals such as calcium, this gelling and complexing is even further exacerbated. In addition, these occurrences can compromise product flavor or cause off-color development. Similarly, it is well established that the addition of various bioavailable iron sources such as ferrous sulfate and ferrous fumarate to flavored milk-based products (*e.g.*, chocolate milk) can cause off-color and off-flavor development.

It is also known that the use of dairy and other proteins below their isoelectric points is particularly problematic. Specifically, dairy proteins will often agglomerate or curdle when formulated below their isoelectric point and will become denatured, making such proteins unsuitable for use.

Quite surprisingly, the present inventors have discovered that the above described problems are overcome through the use of a fiber known as arabinogalactan. In particular, it has been surprisingly discovered that the combination of arabinogalactan together with a dairy and / or soy protein results in an ingestible form that is not compromised in terms of its stability. As further benefits to this surprising discovery, use of the arabinogalactan provides a dietary fiber benefit to the consumer (*e.g.*, prevention of constipation), as well as additional benefits in the field of immune function.

Applicants' Argument

As it is well settled, anticipation requires "identity of invention." Glaverbal Societe Anonyme v. Northlake Mktg. & Supply, 33 USPQ2d 1496, 1498 (Fed. Cir. 1995). To establish a

prima facie case of anticipation under 35 U.S.C. § 102(b), there must be no difference between what is claimed and what is disclosed in the applied reference. See Scripps v. Genetech Inc., 18, USPQ2d 1001, 1010 (Fed. Cir. 1991). Each and every element recited in a claim must be found in a single prior art reference and arranged as in the claim. See In re Marshall, 198 USPQ 344, 346 (CCPA 1978).

1. The XP Reference

First, the Examiner cites XP as disclosing a composition as in Claim 1 "containing skim milk proteins and polysaccharides such as arabinogalactan." As amended herein, Claim 1 requires not only arabinogalactan and protein, but also a pH of from about 2 to about 5. As XP fails to disclose a pH value for the compositions therein, Applicants respectfully assert that each and every element recited in Claim 1 is not taught in XP. As such, Applicants respectfully assert that XP does not anticipate the present invention.

2. The Stanko Reference

Second, the Examiner cites Stanko as disclosing a composition as in Claim 1 containing arabinogalactan and milk, which contains the milk protein casein. As aforementioned, Applicants' Claim 1 requires the composition have a pH of from about 2 to about 5. Like XP, Stanko fails to discuss the pH of the compositions disclosed therein, much less identify the range of from about 2 to about 5 taught in the present Claim 1. Moreover, in regards to Claim 2, Applicants have canceled claim 2 in a sincere effort to advance prosecution of the present application. Additionally, in regards to Claim 27, as amended herein, Claim 27 requires the composition contain soy protein, rather than dairy protein. Stanko teaches only dairy protein and fails to suggest the inclusion of soy protein. For these reasons, Applicants respectfully assert that Stanko does not anticipate the present invention.

3. The Kogyo Reference

Finally, the Examiner cites Kogyo as disclosing a beverage "as in Claims 1, 2 and 27 that contains arabinogalactan, which can be added to processed milk." The Examiner continues by stating, "milk generally has a pH of above 6 as disclosed in claims 2 and 27."

Applicants' respectfully assert that, while milk may generally have a pH of above 6, there is no actual disclosure in Kogyo regarding the pH of the compositions disclosed therein. Moreover, as amended herein, the pH requirement of Claim 1 is from about 2 to about 5, which falls outside of the presumed range of Stanko. Additionally, the foregoing assertions relating to the Stanko reference apply equally to the Kogyo reference in regards to Claims 2 and 27. Thus, Applicants respectfully assert that Kogyo does not anticipate the present invention.

For all of these reasons, Applicants respectfully request withdrawal of the rejection under 35 U.S.C. § 102 (b) over each of XP, Stanko and Kogyo.

The Rejection under 35 U.S.C. § 103(a)

The Examiner has rejected Claims 16-20 under 35 U.S.C. § 103 as being obvious over XP, Kubota, WO 01/74376 A1 (herein "Kubota"), Stanko, Kogyo and further in view of "Composition of Food," pg 132-133.

In a sincere effort to advance prosecution, Claim 16 has been amended and Claims 17-20 have been canceled. Specifically, Claim 16 has been amended to depend from Claim 1, which as amended herein, requires the composition to comprise arabinogalactan, protein and a pH of from about 2 to about 5. Additionally, Claim 16 has been amended to require the compositions of Claim 1 to further comprise a fatty acid selected from the group consisting of omega-3-fatty acids, esters thereof, and mixtures thereof.

In view of the amendments herein, Applicants respectfully assert that the Examiner's burden of establishing a prima facie case of obviousness has not been satisfied. One factor in establishing a prima facie case of obviousness is that the prior art reference (or references when combined) must teach or suggest *all* the claim limitations. See, for example, In re Vaeck, 947 F.2d 488 (Fed. Cir. 1991). Applicants respectfully assert that the Office Action fails to establish the third criteria, and thus, fails to set forth a prima facie case of obviousness under 35 U.S.C. § 103.

Applicants respectfully assert that the prior art references when combined do not teach or suggest *all* the claim limitations. As amended herein, Claim 16, which depends from Claim 1, requires a composition comprising arabinogalactan, protein, a pH of from about 2 to about 5 and a fatty acid selected from the group consisting of omega-3-fatty acids, esters thereof and mixtures thereof. While the prior art may teach compositions containing milk, and milk in turn may contain fat, none of the art references, either alone or combined, teaches all of the requirements of the present invention. Particularly, none of the references teaches an arabinogalactan/protein composition having the specific pH disclosed herein along with omega-3-fatty acids. Because of the prior art's failure to teach all of the limitations of the present claims, Applicants respectfully assert that a prima facie case of obviousness has not been established and respectfully request the rejection under 35 U.S.C. § 103 be withdrawn.

Claims Objected To

The Examiner objected to Claims 3-15, 21-26 and 28-42 as being dependent on a rejected base claim. Applicants respectfully assert that, in light of the amendments and cancellation herein, this rejection has been overcome and respectfully request the withdrawal of this objection.

Furthermore, the Examiner objected to Claim 27 as being improper under 35 U.S.C. § 112, and indicated "Claim 27 would be allowable if rewritten to overcome the rejection under 35 U.S.C. § 112." Applicants respectfully assert that Claim 27 has been amended so as to overcome the rejection under § 112, and respectfully request this objection be withdrawn.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the Examiner's rejection of the present Claims under 35 U.S.C. §§ 112, 102 and 103 is improper. Reversal of such rejections is therefore respectfully requested.

Respectfully submitted,

By 

S. Robert Chuey
Attorney for Appellants
Registration No. 39, 140
Telephone: (513) 634-0102

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Customer No. 27752